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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

KING FISHER MARINE SERVICE, INC.
-- Petitioner

VS.

ROGELIO PEREZ, Personally and Individually
-- Respondent

and

UNITED STATES OF AMERICA
-- Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Kenneth M. Culbreth, Jr.
HENKEL, HYDEN & SANDERS
800 NationsBank Center North
500 North Water St.
Corpus Christi, Texas 78471-0899
(512)883-1500
(512)888-9149 Telecopier

Attorney for Petitioner

74 pp

Questions Presented

Whether under the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), the Attorney General's certification of scope of employment is conclusive for the purpose of removal only and therefore reviewable by the District Court or conclusive and nonreviewable for the purpose of substituting the United States as the sole Defendant and (a) whether King Fisher Marine Service, Inc. (hereinafter referred to as "KFMS") should be allowed full discovery on the scope of employment issue and (b) whether KFMS should be afforded an evidentiary hearing wherein the District Court can determine the scope of employment issue?

PARTIES TO THIS PROCEEDING

The Petitioner respectfully certifies that the persons or corporations listed below may have an interest in the outcome of this litigation:

1. King Fisher Marine Service, Inc.
2. Rogelio Perez
3. United States of America

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court

Petitioner, King Fisher Marine Service, Inc. (hereinafter referred to as "KFMS"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusing to hold that 28 U.S.C.A. §2679 (d) (1)

through (3) of the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") provide that scope certification is conclusive for removal purposes only and refusing to allow Petitioner to conduct full discovery on the scope of employment issue and refusing to afford Petitioner an evidentiary hearing wherein the District Court can determine the scope of employment issue.

OPINIONS BELOW

The opinion of the Court of Appeals was order not published but appears in Appendix "A-1" to this Petition. The unpublished written opinion of the District Court for the Southern District of Texas appears in Appendix "A-12" to this Petition.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on March 22, 1994. This

Court's jurisdiction is invoked under Title 28 U.S.C.A. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C.A. § 2679 (d) of the Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") is set forth in Appendix "A-18".

STATEMENT OF THE CASE

On June 17, 1991, KFMS filed its Original Petition in the State District Court of Galveston County, Texas, 10th Judicial District against Defendant Rogelio Perez (hereinafter referred to as "Perez"), individually and personally for conduct beyond and above Perez' scope of employment with the United States Fish & Wildlife Service whereby Perez intentionally interfered with the contract rights of KFMS. Perez filed his Verified Petition for Removal on July 25, 1991 based on 28 U.S.C.A. § 2679(d)(2) and the certification of scope of employment

wherein the United States Attorney General certified that Perez, was at all times, acting within the scope of his employment as an employee of the United States Fish & Wildlife Service. On August 26, 1991, KFMS filed its Motion to Remand and Amended Motion to Remand asserting (1) that the Federal District Court is without jurisdiction and that the cause of action for intentionally interfering with the contract rights is an action arising out of the common law of the State of Texas (2) that Perez is being sued in his individual and personal capacity and not in his official capacity nor for acts within the scope of his employment (3) challenging the Attorney General's certification of scope of employment and (4) requesting the District Court to allow KFMS full discovery on the scope of employment issue followed by an evidentiary hearing by the District Court

regarding said issue. On September 3, 1991, Perez filed his Opposed Motion to Substitute the United States as a Sole Defendant. On September 10, 1991, Perez and the United States (although the United States had not been substituted as party defendant) filed their Motion to Dismiss or Alternatively, Motion for Summary Judgment. Immediately thereafter, Perez filed his Opposed Motion for Protective Order seeking to preclude KFMS from obtaining answers to Interrogatories, Request for Admissions and Request for Production which had been previously propounded to Perez and further sought to preclude the deposition of Perez which had been noticed for approximately one month previous.

The problem for KFMS now becomes patently clear. The United States Attorney General has certified the scope of employment of Perez and (by refusing to

respond to both written and oral discovery by KFMS) has precluded KFMS from obtaining any information from Perez regarding his wrongful conduct and whether same was within or without the scope of employment. Further, the lawyer for Perez, the United States Attorney General instructed the United States Army Corps of Engineers (hereinafter referred to as the "Corps") in Galveston, Texas to refrain from cooperating with KFMS regarding Perez' interference with the contract between KFMS and the Corps. In other words, the United States filed its Opposed Motion to Substitute the United States as a Sole Defendant and its Motion to Dismiss, or Alternatively, Motion for Summary Judgment under Federal Rule of Civil Procedure 56 by way of Rule 12(b)6 and then precluded KFMS from conducting discovery on the core issue of the proceeding when Rule 12(b) states "all parties shall be given

reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(b).

On September 23, 1991, KFMS filed its Opposition to Perez' and the United States Motion to Dismiss and for Summary Judgment and responded to Perez' Motion to Substitute the United States as the sole Defendant again challenging the United States Attorney General's scope certification and requesting full discovery on the scope of employment issue to be followed with an evidentiary hearing on said issue before the District Court. KFMS promptly filed Notices Duces Tecum to take depositions of key Corps employees including Colonel Brink P. Miller, Robert Beggs and Terrell Roberts who had personal knowledge of the facts relating to KFMS's cause of action against Perez. The United States Attorney General refused to produce said Corps employees.

Although the District Court did not rule on Perez' and the United States Motion to Dismiss, or Alternatively for Summary Judgment, the District Court did grant Perez' Motion to Substitute the United States as the Sole Defendant and Dismissed Perez from the suit on October 10, 1991. KFMS filed its Motion to Reconsider Defendant's Opposed Motion to Substitute the United States as the Sole Defendant, and upon hearing on November 7, 1991, the Court ordered the parties to file affidavits in connection with facts that would support or defeat the Attorney General's certification of scope of employment. In accordance with the Court's order on November 7, 1991, KFMS filed its Response Supporting Plaintiff's Motion to Reconsider Dismissal of Perez and Plaintiff's Motion to Permit Discovery and Plaintiff's Objections and Response to the Affidavits Submitted by Defendants.

On May 15, 1992, the District Court denied KFMS's Motion to Reconsider the Substitution of the United States as the Sole Defendant and Dismissal of Perez and further denied Defendant's Motion for Protective Order. In said Order, the Honorable District Court Judge Hugh Gibson correctly sets forth the contested issues which are now before this Honorable Court by stating:

> The parties disagree primarily over the question of whether certification by the Attorney General is conclusive for the purpose of substitution. Plaintiff argues that the certification is only for removal purposes and is thus reviewable. Defendant argues that the Attorney General's certification that the employee acted within the scope of his employment is conclusive, unreviewable, and substitution of the United States is automatic once the employees conduct is certified.
>
> Moreover, Plaintiff argues the issue of whether Defendant Perez was acting within the scope of his employment when he shut down Plaintiff's construction of a levee where the piping plovers were allegedly sited. Because of its contention of this issue, King Fisher seeks discovery into Mr. Perez' employment files

> before the issue of substitution is decided. In contrast, Defendant seeks the Court's protection to prevent the discovery and to uphold its Order of October 10, 1991.

Judge Gibson then ruled that the Attorney General's certification is conclusive and unreviewable and, once certified by the Attorney General, the substitution of the United States and dismissal of the employee is automatic. It is important to note that the District Court did not make a determination as to the scope of employment issue. On July 10, 1992, KFMS timely filed its Notice of Appeal. On October 23, 1992, the United States filed a Motion to Dismiss the Appeal stating that the October 10, 1991 Order did not constitute a final decision under 28 U.S.C.A. § 1291 in that KFMS did not file a motion under Federal Rule of Civil Procedure 54 requesting the entry of a final judgment as to any of the claims or parties. On November 10, 1992, the

Fifth Circuit Court of Appeals granted the United States Motion to Dismiss thereby dismissing Cause No. 92-7469 then pending. On December 2, 1992, KFMS filed in the United States District Court of Southern District of Texas, Galveston Division, its Motion for Order for Determination under Federal Rule of Civil Procedure 54(b) and Order for Final Judgment. On the same date as the filing of the aforesaid motion, Judge Gibson entered an "Order Making Express Determination Under Rule 54(b) and Finalizing Judgment for Purposes of Appeal." On December 14, 1992, KFMS timely filed its Notice of Appeal. On March 22, 1994, the Fifth Circuit affirmed the District Court's decision holding that "the Attorney General's certification is conclusive on the issue of scope of employment." The result of the foregoing is that the Attorney General (at its sole and conclusive election) is

able to substitute the United States as the party defendant and do so without KFMS having the benefit of discovery or an evidentiary hearing on the scope of employment issue.

REASONS FOR GRANTING THE WRIT

(i) FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT ("FELRTCA")

Prior to the enactment of the FELRTCA, the Federal Tort Claims Act ("FTCA") [28 U.S.C.A. § 1346(b), 2401(b) and 2671 et seq.] had been the sole means for compensating persons injured by the negligent or wrongful acts of Federal employees. See Congressional Findings and Purpose, 28 U.S.C.A. § 2671 (West Supp. 1992). The precursor to the enactment of the FELRTCA was *Westfall v. Erwin*, 108 S.Ct. 580 (1988). In *Westfall*, a civilian employee of the Army brought a state law tort suit against employee supervisors at the Army Depot for injuries

sustained when the employee was exposed to toxic soda ash. After removal of the matter to federal district court, the district court granted summary judgment for the federal employee defendants holding that they were "absolutely immune from suit since the alleged tort was committed while they were acting within the scope of their employment." The court of appeals reversed holding that a federal employee enjoys immunity only if the challenged conduct, in addition to being within the scope of the employees duties, is also a discretionary act. The United States Supreme Court affirmed and in elaborating on this "discretionary function" exception stated:

> The purpose of official immunity is not to protect an erring official, but to insulate the decision making process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government

> will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits. This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contacts outweigh the perhaps recurring harm to individual citizens."

Id. at 583. The Court in *Westfall* further stated that "Congress is in the best position to provide guidance for the complex and often highly imperial inquiry into whether absolute immunity is warranted in a particular context." Id. at 585.

Congress took heed to the advice of the United States Supreme Court and in the latter part of 1988 enacted the FELRTCA [16 U.S.C.A. § 831c-2 (West. Supp. 1992);

28 U.S.C.A. §§ 2671, 2674, 2679 (West Supp. 1992)]. With the enactment of the FELRTCA it appears that the "discretionary function" exception is no longer the determining issue as to whether the Federal employee is subject to personal liability. Rather, the issue becomes whether the subject conduct is within the scope of employment or the scope of the employees governmental duties. See *Lunsford v. Price*, 885 F.2d 236, 237 n. 5 (5th Cir. 1989) ("the FELRTCA, in essence, overrules the distinction *Westfall* drew between "operational" and "discretionary" capacities, and creates absolute tort immunity for acts of federal employees within the course and scope of their employment); see also Congressional Findings and Purpose, 28 U.S.C.A. § 2671 (West. Supp. 1993) ("it is the purpose of this Act to protect federal employees from personal liability for common law torts

committed within the scope of their employment, while providing persons injured by the common law torts of federal employees with an appropriate remedy against the United States.")

(ii) PROCEDURAL LAW UNDER THE FELRTCA

Congress established the following specific procedures to be implemented upon the initiation of a suit against a Federal employee:

1. Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

2. Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or

proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal.* [emphasis added]

3. In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the Untied States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the

> petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. *In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.* [emphasis added]

28 U.S.C.A. § 2679(d)(1)-(3) (West Supp. 1992).

Nowhere in the above cited provisions does Congress state the Attorney General's certification is conclusive as to scope of employment. To the contrary, Section 2679(d)(2) states "this certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." Further, Congress specifically refers to judicial

review of the scope of employment issue in the event the Attorney General refuses to certify scope of employment. See 28 U.S.C.A. § 2679(d)(3) (West Supp. 1992). Since the refusal of the Attorney General to certify scope of employment is not determinative of scope of employment as set forth in § 2679(d)(3) the corollary, of course, would be that the Attorney General's certification is not conclusive as to the issue of scope of employment either. It is only logical that the scope of employment issue be decided by an impartial jurist rather than the party's attorney who happens to be the Attorney General of the United States. Indeed, is there any other circumstance in our jurisprudence where the defendant's attorney can conclusively and unilaterally, for all purposes, cause the substitution of another defendant to replace the named defendant and thereby

put the plaintiff to a much higher of difficulty proof requirement?

KFMS respectfully submits that the Attorney General's certification of scope of employment is conclusive only as to removal. Once the certification is challenged, as was done by KFMS, the District Court must allow the Plaintiff full discovery on the issue of scope of employment and, after an evidentiary hearing, the District Court -- not the defendant's attorney -- should then make the ultimate determination. Although the Fifth Circuit appears to have held to the contrary on one occasion published more than four years ago, seven (7) other Judicial Circuits of the United States have held that the Attorney General's scope certification is conclusive for the purpose of <u>removal only</u> and once challenged should be ultimately decided by

the District Court after having allowed the parties full discovery on the issue.

(iii) JUDICIAL REVIEW OF SCOPE CERTIFICATION

(a) FIFTH CIRCUIT -- SCOPE CERTIFICATION NONREVIEWABLE

In *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990), the Fifth Circuit addressed the intentional tort exceptions[1] in conjunction with the certification of scope of employment. The Fifth Circuit held that an action against a federal employee who has been certified as acting in the scope of her employment must proceed exclusively against the United States under the FTCA, even if the action was based on an alleged assault and

---

[1] Recovery from the United States under the FTCA and the FELRTCA cannot be had for the following pertinent claims:

> (h) any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C.A. § 2680 (West 1965 and West Supp. 1992).

battery by a federal employee, for which the United States had sovereign immunity. See id. at 134-135. The Fifth Circuit stated that the certification by the Attorney General was conclusive as to the issue of whether the employee acted within the scope of employment. See id. at 131; see also *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989).

In *Mitchell* , a nurse's assistant at a federal military facility hospital brought a state court suit against her supervisor, an Army officer, for assault and battery. The Attorney General certified that the officer was acting within the scope of employment at the time of the alleged tort and the United States was automatically substituted as a party defendant. On its own motion, the United States District Court for the Western District of Texas held that the District Court did not have jurisdiction

over the claim due to the United States' sovereign immunity, vacated the previous order substituting the United States, and re-substituted the officer as a defendant and remanded it to state court. The Fifth Circuit held that the district court erred in substituting the federal employee as a party defendant and remanded the case stating that the district court was "apparently motivated by desire to provide the plaintiff with a possible remedy." The Fifth Circuit then stated:

> An action against a Federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA. Since there is no remedy for assault and battery in the FTCA, Congress intended to leave a plaintiff such as *Mitchell* without a remedy for injuries sustained as a result of a federal employee's alleged assault and battery while in the course of employment.

Id. at 896.

The Court further opined that, upon discovering the jurisdictional exclusion of liability for acts of assault and battery, the district court should have dismissed the entire case. Finally, The Fifth Circuit stated "this result may be thought to be harsh, but Congress has decided to relieve its employees of the burden of defending litigation, which is both distracting and costly, and often to the detriment of government operations." *Mitchell*, 896 F.2d at 136. KFMS also believes that the result is harsh and offers the following scenario as illustration. If the Attorney General's scope certification is conclusive for all purposes and nonreviewable, then regardless of how heinous an intentional act by the employee may be, the mere certification by the federal employee's lawyer absolves the federal employee from liability and precludes the victim from

recovery from either the federal employee or the United States since the United States has not waived sovereign immunity with reference to this heinous act. What incentive does the Attorney General have to refuse certification where he knows the federal employee, who has been dismissed from the suit, and the United States will never be held liable?

While the *Mitchell* Court specifically held that the "new certification procedure has a conclusive effect on the issue of whether the employee acted within the scope of employment," the Court appears to rectify this holding by disagreeing with the appellant's contention that with the enactment of the FELRTCA Congress intended to deny the district court's the power to remand a FELRTCA case, regardless of the reason, once the Attorney General has issued certification. The *Mitchell* Court

explains its disagreement with appellant's assertion as follows:

> As a corollary to the act of repeal, Congress provided in the Westfall Act [referred to in this Brief as the "FELRTCA"] that in cases in which the Attorney General has *not* issued certification the district court retains its previously held power to remand a case to the state court if it finds that the employee acted outside the scope of this employment. See 28 U.S.C.A. § 2679(d)(3). Contrary to the suggestion of appellants, however, this provision does not give any indication that Congress left the court without the power to remand for lack of jurisdiction in cases in which the Attorney General *has* issued a certification.

Mitchell, 896 F.2d at 131, n.2. This explanation and response to appellant's assertion, indicates that the *Mitchell* Court does in fact deem proper the judicial review of the Attorney General's scope certification. Further, it appears that the Fifth Circuit has previously suggested that plaintiff may seek judicial review of certification. See *Lunsford v. Price,* 885 F.2d 236, 238 n.7 (5th Cir.

1989) (noting that plaintiffs did not contest certification that employees' acts were within scope of employment).

(b) OTHER UNITED STATES COURTS OF APPEAL -- SCOPE CERTIFICATION JUDICIALLY REVIEWABLE

While the Fifth Circuit Court of Appeals has held, in *Mitchell*, that the government's scope certification is conclusive, thereby allowing no judicial review, seven (7) other judicial circuits of the United States have held to the contrary. See *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Melo v. Hafer*, 912 F.2d 628 (3rd Cir. 1990), *aff'd*, 112 S.Ct. 560 (1991); *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990); *Hamrick v. Franklin*, 931 F.2d 1209 (7th Cir. 1991); *Forrest City Machine Works, Inc. v. United States*, 953 F.2d 1086 (8th Cir. 1992); *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991); *Meridian International Logistics, Inc. v. United States*, 939 F.2d

740 (9th Cir. 1991); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); *Wang v. United States*, 947 F.2d 1400 (9th Cir. 1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), *amended*, 924 F.2d 1555 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 62 (1991).

(1) FIRST CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) the First Circuit spoke directly to the issue of whether the Attorney General certification may be judicially reviewable. The Court stated that "while § 2679(d)(2) provides that the Attorney General's certification 'shall conclusively establish scope of office or employment for *purposes of removal*,' we do not read this language as manifesting Congressional intent that certification places the scope question permanently beyond judicial reach. (emphasis

supplied)." *Nasuti*, 906 F.2d at 812. The First Circuit further stated:

> [W]hile we entirely concur with the [Fifth and Tenth Circuits] view that scope certification must be given conclusively effect for purposes of removal, that conclusive effect lasts only until the Court speaks on the specific scope issue. Congress cannot have meant to cut off judicial determination of a genuine controversy relative to the scope question which may, as here, be dispositive of the rights and liabilities of the parties. Where, as here, the Attorney General has certified that the government employee was acting within the scope of his employment, but the tort charged (assault and battery) is one of the § 2680(h) exceptions which could not by definition be within the scope of employment, <u>there is an obvious need for a disinterested forum to resolve the matter</u>. Permitting an orderly judicial determination in, exclusively, a federal forum, assists--it does not weaken--the statutory purpose behind the Attorney General's certification. The Attorney General can see to it, by making the certification, that the federal defendant scope status is resolved by a federal, not a state tribunal; employee immunity will thus be protected, in keeping with the Westfall Act's purpose, except where the plaintiff can convince a federal court that the government employee was acting outside the scope of his employment and, therefore, by

> definition, was not entitled to immunity from personal liability. [emphasis added]

Nasuti, 906 F.2d 802, 813 n.16. The First Circuit also stated that there may be a separation of powers question if the FELRTCA were read to leave the Attorney General as the sole judge of an issue determinative of the jurisdiction of the Federal Court, as well as an issue of fundamental fairness. See id. at 813. The First Circuit then directed the district court to vacate its remand order and proceed to determine the merits of the scope of the employment issue. If the district court finds that employee was acting without the scope of his employment, the case will be remanded. However if the employee was acting within the scope of his employment, the case will be dismissed since assault and battery is excepted under the FELRTCA.

(2) THIRD CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Melo v. Hafer*, 912 F.2d 628 (3rd Cir. 1990) *aff'd on other grounds*, 112 S.Ct. 560 (1991), the plaintiffs brought certain state law claims, including contractual interference, against federal employees. The Attorney General certified scope of employment and after the United States was substituted as the party defendant, the district court dismissed the claim. In remanding the case to the district court regarding the government's scope certification, the Third Circuit Court of Appeals held that "based on the language, structure, and legislative history of the FELRTCA, we thus independently conclude that the district court may review the government certification. . . . ." *Melo*, 912 F.2d at 642. In interpreting the scope

certification requirement set forth in the FELRTCA, the Court stated the following:

> We must first look to the language of the statute, [*citation omitted*], and in particular to the distinction in the language between Sections 2679(d)(1), governing certifications in cases filed initially in federal court, and Section 2679(d)(2) authorizing the Attorney General to provide certifications for the purpose of removing actions filed in stated court to federal court. The last sentence of Section 2679 (d)(2) specifically provides that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." 28 U.S.C. § 2679(d)(2) (emphasis added). There is no similar language of conclusiveness in § 2679(d)(1). Also, the explicit statement that the binding character of certification applies only "for purposes of removal" suggests that Congress recognized a distinction between use of the certification for removal and its use for purposes of substitution of the government as the defendant in actions filed in federal court. . . . . There is no suggestion in the FELRTCA that once the federal forum has been secured, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C.

> § 2679(d)(3) (1988) "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination. *There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs.* [emphasis added].

Melo, 912 F.2d 628 at 641.

(3) SIXTH CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990), the Attorney General certified that the defendants employees were acting within the scope of their employment in connection with the events underlying the plaintiff's suit. The district court then substituted the United States as the defendant and dismissed plaintiff's action for failure to exhaust administrative remedies. The district

court had determined that the government's scope certification was conclusive and nonreviewable. The appellant, in the same position as KFMS, argued that the district court erred by deeming the scope certification conclusive and by denying her the opportunity to conduct additional discovery relevant to whether the defendants were indeed acting within the scope of their employment. *Arbour*, 903 F.2d at 421. In finding the district court's determination erroneous and remanding the case back to the district court, the Sixth Circuit Court of Appeals looked to the legislative history of the FELRTCA for guidance in finding that the scope certification is indeed judicially reviewable. In so doing, the Court stated:

> Representative Frank of Massachusetts, the sponsor of the Westfall Act [referred to herein as the FELRTCA], noted that a plaintiff would still have the right to contest the certification under the Westfall

> Act if he or she thought the Attorney General was certifying without justification. See *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 128 (April 14, 1988) (statements of Representative Frank). In response, a representative of the Department of Justice agreed that a plaintiff may challenge a certification, adding that the certification would be reviewable by a court. See id. at 133. (statements of Deputy Assistant Attorney General Robert L. Willmore).

Arbour, 903 F.2d at 416. Accordingly, the Third Circuit held "a plaintiff who is dissatisfied with a scope certification may challenge the certification judicially." Id.

(4) SEVENTH CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Hamrick v. Franklin*, 931 F.2d 1209 (7th Cir. 1991), the plaintiffs brought suit against federal employees alleging libel and interference with employment contract rights. The Attorney General certified scope of employment and

urged the district court to accept the certification and substitute the United States as the sole defendant. The district court complied. The question then presented to the Seventh Circuit Court of Appeals is whether the scope certification is subject to judicial review. The Court made an interesting observation in finding that the government had changed its position asserted in the district court that the scope certification is not subject to judicial review and noted that the government has dropped that position entirely in a number of other cases as well. *Hamrick*, 931 F.2d at 1210.

In holding that the government's scope certification is judicially reviewable, the Seventh Circuit stated:

> We agree with the government and the plaintiffs here that based on the statutory language and the legislative history [of the FELRTCA], the scope certification is conclusive only with respect to removal, and the

> district court has the power to review the certification. Further, when a review of the scope certification is requested, as it was here, the district court should give *de novo* review to determine whether the certification was proper. In this review, the plaintiffs have the burden of showing that the defendant's conduct was not within the scope of employment.

Id. The Court then remanded the case back to the district court for determination as to whether the defendant federal employees were acting within the scope of employment.

(5) EIGHTH CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991), the Eighth Circuit deciding the issue as one of first impression held that the Attorney General's certification is judicially reviewable on the question of substitution. See *Brown*, 949 F.2d at 1011. Attempting to set forth procedural guidelines by which challenges to the

government certification should be handled, the Court stated:

> [C]hallenges to the Attorney General certification must be resolved before trial, as soon after the motion for substitution as practicable even if an evidentiary hearing is needed to resolve relevant fact disputes. When the government moves for substitution, the Attorney General's certification, although subject to judicial review, is prima facie evidence that the employee's challenged conduct was within the scope of employ. Therefore, the burden of altering the status quo is on the plaintiff, who must come forward with specific facts rebutting the government's scope of employment certification. [*citation omitted*] If the issue is contested, plaintiff bears the burden of proving that the employee was not acting within the scope of employ, consistent with the purpose of § 2679(d) and with the general scheme of the FTCA in which plaintiff bears the burden of proof on this issue. See *In re: Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952) (en banc), *aff'd sub nom, Dalehite v. United States*, 373 S.Ct. 1956 (1953).

Brown, 949 F.2d at 1012; see also *Forrest City Machine Works, Inc. v. United States*, 953 F.2d 1086 (8th Cir. 1992)(following *Brown*).

(6) NINTH CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *Meridian International Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991), an FBI agent was sued for libel and slander in state court. The Attorney General certified scope of employment and the action was removed to federal district court where the United States was substituted as the sole defendant. The question of first impression presented to the Ninth Circuit was whether the government certification under § 2679(d) is binding for the purpose of substitution of the Government or whether the certification is subject to judicial review. In holding that "Congress intended to make scope certification unreviewable only with respect to removal" and not with respect to substitution, the Ninth Circuit espoused the following reasoning:

> Beyond the [FELRTCA's] language and history, there are two compelling reasons to allow judicial review of scope determinations. First, if the Government's scope certification has a conclusive effect on substitution, the executive branch would have the power to dictate the judicial branches subject matter jurisdiction. [*citations omitted*] Such power in the executive branch raises troubling separation of powers issues. Second, leaving the final determination of scope to the Attorney General would allow an interested party to control a dispositive issue and would present possible due process implications. [*citation omitted*]

Meridian, 939 F.2d at 744; see also *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991) and *Wang v. United States*, 947 F.2d 1400, 1402 (9th Cir. 1991) ("the unavoidable implication of our decision in *Meridian International* is that, absent extraordinary circumstances, plaintiffs must be provided with a full and fair opportunity to participate in evidentiary hearings on the question of whether a defendant will be certified an "employee" of the United States acting within the scope of his employment.")

(7) ELEVENTH CIRCUIT -- SCOPE CERTIFICATION REVIEWABLE

In *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), *amended*, 924 F.2d 1555 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 62 (1991), the issue presented to Eleventh Circuit Court of Appeals is whether the Attorney's General's office or the federal district court is the forum entrusted with determining whether the challenged conduct occurred within the scope of employment for purposes of substituting the United States as a defendant. After an in-depth analysis and review of the statutory language, the legislative history and policy considerations, the Court concluded that the Attorney General's scope certification is pertinent and dispositive only for removal purposes and that the federal district court may review the

issue of scope of employment when challenged. The Court opined:

> The [FELRTCA's] policy of insuring federal review of suits involving federal employees is not at all furthered by requiring a federal court to defer to the Attorney General's scope certification in determining the substitution issue. The conclusion that the Attorney General's scope certification does not warrant judicial deference is further supported by the fact that the Attorney General does not possess a particular expertise in determining whether a federal employee's action occurred in the scope of his employment *within the meaning of the appropriate state law.*[2] Finally, our concern with the highly discretionary and potentially biased nature of the Attorney General's certification determination reinforces our view that such a scope certification should not be entitled to deference in the substitution context.

Lehtinen, 913 F.2d at 1543.

Once the Attorney General has certified the scope of employment, the burden then shifts to the plaintiff to prove otherwise. In so doing, "the

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[2] Under the FTCA, the law of the place of the alleged tort governs the scope-of-employment question. See *Williams v. United States*, 76 S.Ct. 100 (1955).

district court should conduct a de novo hearing on whether the defendant federal employee's conduct occurred within the scope of his employment and permit the plaintiff full discovery on the scope question." Id. at 1544; see also *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (reversing district court's denial of plaintiff's discovery requests on scope of employment issue).

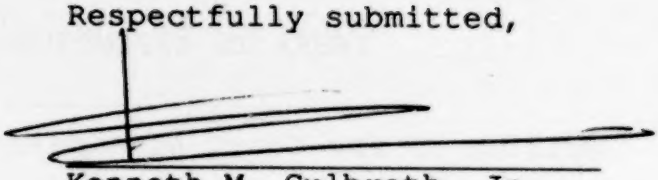
CONCLUSION

Consistent with the very language of the legislation and consistent with an overwhelming majority of the judicial circuits of the United States, the Attorney General's scope certification should be judicially reviewable by the impartial district court. Further, consistent with due process, separation of powers and fundamental fairness, KFMS should be allowed full discovery on the scope of employment issue as is customary

in any adversarial proceeding to determine a dispositive factual issue. To require KFMS to meet its burden of proving that the subject conduct is outside the scope of employment, without the benefit of any discovery, emphasizes the weakness and fallacy of the Attorney General's position. Counsel for KFMS has never encountered any other situation or legal issue where opposing counsel can unilaterally and conclusively elect to substitute a party, which alters the applicable substantive law, and then preclude all discovery from those who have knowledge of relevant facts. Therefore, Petitioner King Fisher Marine Service, Inc. respectfully requests a writ of certiorari issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: June 14, 1994.

Respectfully submitted,



Kenneth M. Culbreth, Jr.

Attorney for Petitioner

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-7020
Conference Calendar

KING FISHER MARINE SERVICE,
Plaintiff-Appellant,

versus

ROGELIO PEREZ, ETC.,
Defendant,

and

UNITED STATES OF AMERICA,
Defendant-Appellee.

- - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Texas
USDC No. CA-G-91-267

- - - - - - - - - - -

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

King Fisher Marine Service, Inc. (KFMS) argues that the district court

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

erred as a matter of law in holding that the Attorney General's certification of Perez' scope of employment is conclusive, in refusing to allow discovery on the issue, and in refusing to conduct an evidentiary hearing to determine the scope of employment issue. KFMS argues that 28 U.S.C. § 2679(d)(1) and (2) provide that the certification is conclusive for removal purposes only and cites opinions from seven other circuit courts which have so held.

The Federal Tort Claims Act provides that federal employees acting within the course and scope of their employment are immune from liability. Mitchell v. Carlson, 896 F.2d 128, 130 (5th Cir. 1990). In Mitchell, this Court stated that "once the United States Attorney certifies that the federal employee acted within the scope of her employment, the plaintiff properly can proceed only

against the United States as defendant." 896 F.2d at 133. This Circuit has held that the Attorney General's certification is conclusive on the issue of scope of employment. Id. at 131; Fenelon v. Duplessis, No. 92-3200 (5th Cir. Jun. 29, 1993) (unpublished; copy attached).

Even if seven other circuits have disagreed with this Circuit on this issue, this panel may not overrule previous panel decisions absent *en banc* reconsideration or a superseding contrary decision of the Supreme Court. Matter of Dyke, 943 F.2d 1435, 1441-42- (5th Cir. 1991).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3200
Summary Calendar

BARBARA A. FENELON,

Plaintiff-Appellant,

versus

HEDY DUPLESSIS, ET AL.,

Defendant-Appellees.

Appeal from the United States District Court For the Eastern District of Louisiana
(CA 91 810 H c/w 91 1011 H, 91-1012 & 91-1159 H)

(June 29, 1993)

Before POLITZ, Chief Judge, DAVIS and JONES, Circuit Judges.

POLITZ, Chief Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Barbara Fenelon appeals dismissal of multiple asserted claims arising out of her former employment with the U.S. Postal Service. Finding no error, we affirm.

Background

Fenelon filed four lawsuits complaining of her treatment by the U.S.P.S.[1] One concerned the handling of her administrative complaints of discrimination, another concerned an accident in which she was physically removed from the post office, a third addressed events leading up to her final termination and the fourth alleged retaliation for prior charges of discrimination. The suits asserted various tort and constitutional claims, as well as claims under 5 U.S.C. § 552a(g), 42 U.S.C. § 2000e-16, and 42 U.S.C. § 1983. Fenelon named various USPS officers

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[1] Two suits were filed in state court and removed by the government.

and employees as defendants but did not name the Postmaster General or the Postal Service itself. All four complaints sought monetary relief; none sought reinstatement. The district court consolidated and then dismissed the four actions. This appeal followed.

Analysis

In dismissing Fenelon's tort claims, the district court held that they could not be prosecuted under the Federal Tort Claims Act. Prevailing law, however, gives her no choice. As the Supreme Court explained in **United States v. Smith**, Congress amended the FTCA in 1988 to make it "the exclusive remedy for torts committed by Government employees in the scope of their employment[2] 28 U.S.C. § 2679 (b) (1) provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of

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[2] 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134, 142-43 (1991).

> property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . .

Fenelon next contends that the individual defendants were not acting in the scope of their employment at the time of the conduct of which she complains. That objection is defeated by the Attorney General's certification that they were. As we explained in **Carlson v. Mitchell,** one purpose of the 1988 amendment to the FTCA was "to give the new certification procedure conclusive effect on the issue of whether the employee acted within the scope of employment."[3]

Similarly futile is Fenelon's objection to the district court's

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[3] 896 F.2d 128, 131 (5th Cir. 1990); see also **Smith**.

substitution of the United States as the sole defendant in the tort claims, for 28 U.S.C. § 2679 (d) (1) provides that upon certification, the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant."[4]

Fenelon may not succeed with her intentional tort claims because they are not actionable under the FTCA.[5] She argues, however, that her claims should not have been dismissed because they are cognizable under state law. Fenelon obviously fails to understand that special rules apply when the alleged culprit is a federal employee. As the Supreme Court recognized in **Smith**, the FTCA sometimes may leave an injured party without a remedy.

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[4] See also **Smith**.

[5] 28 U.S.C. § 2680 (h).

The district court dismissed Fenelon's remaining tort claims for lack of subject matter jurisdiction because she did not exhaust administrative remedies under the FTCA.[6] Fenelon contends that she filed an administrative claim on January 28, 1991. Each of her lawsuits, however, was filed less than six months after the filing of the administrative claim[7] and without a final agency disposition. Fenelon has failed to comply with the requirements of 28 U.S.C. § 2675.

The FTCA does not preclude monetary remedies against individual federal employees or officers for claims brought under the federal constitution.[8] Fenelon's constitutional claims are

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[6] See **McAfee v. Fifth Circuit Judges**, 884 F.2d 221 (5th Cir. 1989), cert. denied, 493 U.S. 1083 (1990).

[7] The lawsuits were filed on January 22, January 31, February 27, and March 26, 1991, respectively.

[8] 28 U.S.C. § 2679 (b) (2).

foreclosed, however, by Supreme Court precedent. In **Bush v. Lucas,**[9] the Supreme Court refused to create a cause of action for federal employees seeking monetary damages from the government for constitutional violations, declining to disturb the balance between employee rights and government efficiency struck by Congress in fashioning a civil service remedy. We likewise refused to create a constitutional cause of action for a terminated Postal Service employee in **Broussard v. U.S. Postal Service.**[10] Dismissal of Fenelon's constitutional claims was proper.

Remaining are those claims arising under federal statutes. Like constitutional claims, they are not precluded by the FTCA.[11] Further, 42

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[9] 462 U.S. 367, 103 S.C.t. 2404, 76 L.Ed.2d 648 (1983).

[10] 674 F.2d 1103 (5th Cic. 1982).

U.S.C. § 2000e-16 provides the exclusive remedy for discrimination in federal employment.[12] The fatal defect in Fenelon's Title VII claim is that she failed to name the proper defendant: the Postmaster General.[13] Fenelon's Privacy Act claim, 5 U.S.C. § 552a(g), likewise fails because she did not name the appropriate defendant: the U.S. Postal Service itself.[14]

AFFIRMED.

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[11] 28 U.S.C. 2679 (b) (2).

[12] **Brown v. General Services Admin.**, 425 U.S.820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976).

[13] **Lamb v. U.S. Postal Service**, 852 F.2d 845 (5th Cir. 1988).

[14] **Connelly v. Comptroller of the Currency**, 876 F.2d 1209 (5th Circ. 1989).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

KING FISHER MARINE SERVICE, INC.	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. G-91-267
ROGELIO PEREZ, ET AL.	§	

ORDER

Before the Court are: Motion by Plaintiff King Fisher Marine Service, Inc. to Reconsider Defendant's Opposed Motion to Substitute the United States as the Sole Defendant; and Defendant's Opposed Motion for Protective Order. On October 10, 1991, the Court granted Defendant's motion substituting the United States in the place of Rogelio Perez.

The Court entered its motion pursuant to 28 U.S.C. § 2679(d) which governs scope of employment certification by the Attorney General. According to the statute, once the federal employee is certified as having acted within the scope

of his employment in relation to his acts which are the basis for a cause of action, the next step is substitution of the United States of America in the employee's place as sole defendant.

The Court held a hearing on the two motions on November 7, 1991. The Court requested the parties to file affidavits in support of their arguments. Defendant then filed a notice of appeal on the issue of the United States substitution in the place of Mr. Perez while Defendant's motion for reconsideration was still pending. On April 3, 1992, the Fifth Circuit dismissed the notice of appeal based on Plaintiff's motion to withdraw.

1. Contested Issues

The parties disagree primarily over the question of whether certification by the Attorney General is conclusive for the purpose of substitution. Plaintiff argues that the certification is only for removal

purposes and is thus reviewable. Defendant argues that the Attorney General's certification that the employee acted within the scope of his employment is conclusive, unreviewable, and substitution of the United States is automatic once the employee's conduct is certified.

Moreover, Plaintiff argues that the issue of whether Defendant Perez was acting within the scope of his employment when he shut down Plaintiff's construction of a levee where the piping plovers were allegedly sighted. Because of its contention of this issue, King Fisher seeks discovery into Mr. Perez's employment files before the issue of substitution is decided. In contrast, Defendant seeks the Court's protection to prevent this discovery and to uphold its Order of October 10, 1992.

2. Case Law in the Circuit

The Fifth Circuit, in Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990), held that under the Westfall Act (28 U.S.C. § 2679) once the United States Attorney certifies that the federal employee acted within the scope of her employment, the plaintiff properly can proceed only against the United Sates as defendant. Id. at 133. To do otherwise would deny a federal employee the immunity which the Westfall Act bestows.

Mitchell cites to Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989), which strongly held that the plaintiff could not seek remedy for interference which contractual rights against employees individually, because Congress clearly intended the Federal Tort Claims Act (FTCA) to provide the sole remedy for persons injured by federal employees acting within the scope of their employment. Id. at 135.

A clearer statement of the Fifth Circuit's position cannot be had on the issue of certification. In addition, the Circuit declined to follow the Ninth Circuit's position that certification is not conclusive on the issue of substitution. Following the Ninth Circuit would result in ignoring the general language of 28 U.S.C. § 2679(b), which this Court will not do. The Court therefore denies Plaintiff's motion for reconsideration.

CONCLUSION

Finally, the Court denies Defendant's motion for protective order on the issue of scope of employment because of the Court's denial of Plaintiff's motion for reconsideration making discovery on the issue of scope of Mr. Perez' employment irrelevant. Therefore, it is

ORDERED and ADJUDGED that Plaintiff's Motion for Reconsideration of the Court's

Order dated October 10, 1991 substituting the United States in the place of Mr. Perez is DENIED. Further, ORDERED that Defendant's Motion for Protective Order is DENIED.

DONE at Galveston, Texas this 15th day of May, 1992.

/s/ Hugh Gibson
UNITED STATES DISTRICT JUDGE

/mb

28 U.S.C.A. § 2679 (d).

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before

trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such

action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of this petition shall be served upon the United States in accordance with the provision of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1436(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subjection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if --

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

Supreme Court, U.S.
FILED
OCT 24 1994
THE CLERK

No. 94-48

In the Supreme Court of the United States

OCTOBER TERM, 1994

KING FISHER MARINE SERVICE, INC., PETITIONER

v.

ROGELIO PEREZ AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Attorney General's certification under the Westfall Act, 28 U.S.C. 2679(d), that a government employee was acting within the scope of employment conclusively requires that the United States be substituted for the employee as the defendant in a civil action.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-48

KING FISHER MARINE SERVICE, INC., PETITIONER

v.

ROGELIO PEREZ AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 20 F.3d 466 (Table). The opinion of the district court (Pet. App. A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1994. The petition for a writ of certiorari was filed on June 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the court of appeals' determination that the Attorney General's certification that a federal employee was acting within the scope of employment is conclusive for purposes of substitution of the United States as the defendant in a pending civil action. The court of appeals followed its prior unpublished decision in *Fenelon* v. *Duplessis*, 997 F.2d 880 (Table), reh'g en banc denied, 3 F.3d 441 (1993) (Table), and concluded that the Attorney General's certification is not subject to judicial review.

1. This Court held in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), that the judicially created doctrine of official immunity does not provide complete protection to federal government employees for torts committed within the scope of their employment. Congress subsequently enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. The Westfall Act provides immunity to government employees for torts committed while acting within the scope of their employment by requiring that the United States be substituted as the defendant. The suit then proceeds against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*

The Westfall Act accomplishes this result through a statutory provision that states in relevant part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of

> this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. 2679(d)(1).[1] The remedy against the United States "is exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). The Attorney General has delegated the authority to certify that an employee was acting within the scope of the employee's office or employment to the United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3.

2. Petitioner filed this action in the District Court for Galveston County, Texas, 10th Judicial District, against respondent Rogelio Perez, an employee of the United States Fish and Wildlife Service, alleging intentional interference with petitioner's contractual rights. Petitioner contended that Perez acted tortiously

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[1] Subsection (d) also authorizes the United States to remove actions from state court, stating:

> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. 2679(d)(2).

in alerting the Army Corps of Engineers about the presence of migratory birds at a site where petitioner was conducting dredging operations for the Corps of Engineers and in requesting the Corps of Engineers to suspend dredging operations while the birds remained at the site in order to avoid a possible violation of the Endangered Species Act of 1973, 16 U.S.C. 1536. Petitioner alleged that respondent's actions caused the Corps of Engineers to cancel its contract with petitioner.

Pursuant to the Westfall Act, the United States Attorney certified on behalf of the Attorney General that Perez was acting within the scope of his office or employment at the time of the incident that gave rise to petitioner's claim. Perez then filed a petition to remove the action to the United States District Court for the Southern District of Texas. See 28 U.S.C. 2679(d)(2). Petitioner filed a motion asserting several grounds to remand the action to state court, including a claim that Perez was not acting within the scope of his employment. In that motion, petitioner also sought discovery from respondents on the issue of scope of employment. Perez moved for a protective order against such discovery. The government also moved to substitute the United States for Perez as defendant, and the district court granted that motion. Petitioner subsequently filed a motion for reconsideration of the substitution order.

The district court denied the motion to reconsider on the ground that a certification by the Attorney General that an employee was acting within the scope of office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. A15-A16. Because petitioner's request for discovery pertained solely to its motion challenging the

scope-of-employment certification, the district court concluded that its denial of the motion for reconsideration obviated the need for a protective order, which it therefore denied. *Id.* at A16. After substituting the United States for Perez, the court entered a final judgment under Fed. R. Civ. P. 54(b) dismissing Perez from the action. See Pet. 10-11. The United States then moved to dismiss the complaint for lack of jurisdiction based upon petitioner's failure to file an administrative claim with the Fish and Wildlife Service. On June 17, 1993, the district court granted the motion and entered final judgment for the United States.

Petitioner appealed. In a per curiam order, the court of appeals affirmed the order of the district court that substituted the United States as defendant for Perez. It held that, under the law of the circuit, a certification by the Attorney General that an employee was acting within the scope of his office or employment at the time of the incident that gave rise to the claim is conclusive and not subject to judicial review. Pet. App. A2-A3. See *Mitchell* v. *Carlson*, 896 F.2d 128, 133 (5th Cir. 1990); *Fenelon* v. *Duplessis*, 997 F.2d 880 (Table), reh'g en banc denied, 3 F.3d 441 (5th Cir. 1993) (Table).

DISCUSSION

Petitioner challenges the court of appeals' determination that Perez was acting within the scope of his employment for purposes of the Westfall Act at the time of the incident from which its claim arises. Petitioner specifically takes issue with the court of appeals' ruling that the Attorney General's scope-of-employment certification is conclusive under the Westfall Act. Pet. 12-43.

The Westfall Act does not expressly provide for judicial review of the Attorney General's certification

decisions. Immediately after enactment of the Westfall Act, the United States took the position that the Attorney General's scope-of-employment certification is conclusive and not subject to judicial review. The United States subsequently reconsidered its position, however, and concluded that the certification decision is reviewable. See U.S. Br. in Opp. in *Lehtinen* v. *S.J. & W. Ranch, Inc.*, cert. denied, 112 S. Ct. 62 (1991) (No. 90-1789); U.S. Br. in Opp. in *Johnson* v. *Carter*, cert. denied, 114 S. Ct. 57 (1993) (No. 92-1591).

The question presented in this petition is also presented in *Gutierrez de Martinez* v. *Lamagno*, petition for cert. pending, No. 94-167. The United States has suggested that that petition should be granted. See U.S. Br. in No. 94-167. If the Court decides to grant the petition in *Gutierrez de Martinez*, its decision in that case would control the disposition of this case. We therefore suggest that the Court hold the petition in this case pending the decision in *Gutierrez de Martinez* and then dispose of the petition accordingly.[2]

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[2] We believe that the Fourth Circuit's decision in *Gutierrez de Martinez* presents a preferable vehicle for this Court's consideration of the issue. The *Gutierrez de Martinez* decision rests on the Fourth Circuit's binding en banc precedent in *Johnson* v. *Carter*, 983 F.2d 1316, 1319-1321, cert. denied, 114 S. Ct. 57 (1993). The Fifth Circuit's law on the matter, however, is unsettled. The Fifth Circuit's decision in this case relies principally on that court's prior unpublished decision in *Fenelon, supra*. See Pet. App. A3, A4-A11. The Circuit is currently reconsidering the issue en banc in *Garcia* v. *United States*, No. 92-8490 (5th Cir.) (argued Sept. 12, 1994).

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Gutierrez de Martinez* v. *Lamagno*, No. 94-167, and disposed of in accordance with the decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
PETER R. MAIER
Attorneys

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